

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS

3 PROJECT VERITAS ACTION FUND,)

4 Plaintiff)

5 -VS-)

CA No. 16-10462-PBS

) Pages 1 - 39

6 DANIEL F. CONLEY, In his)
7 Official Capacity as Suffolk)
County District Attorney,)

8 Defendant)

9
10 **MOTION HEARING**

11 BEFORE THE HONORABLE PATTI B. SARIS
12 UNITED STATES CHIEF DISTRICT JUDGE
13
14
15

16 United States District Court
17 1 Courthouse Way, Courtroom 19
Boston, Massachusetts 02210
18 November 4, 2016, 2:42 p.m.
19
20
21
22

23 LEE A. MARZILLI
24 OFFICIAL COURT REPORTER
United States District Court
25 1 Courthouse Way, Room 7200
Boston, MA 02210
(617)345-6787

1 A P P E A R A N C E S:

2 GREGORY D. COTE, ESQ., McCarter & English, LLP,
3 265 Franklin Street, Boston, Massachusetts, 02110,
4 for the Plaintiff.

5 STEPHEN KLEIN, ESQ., Pillar of Law Institute,
6 500 Madison Street, #419, Alexandria, Virginia, 22314,
7 for the Plaintiff.

8 RYAN E. FERCH, ESQ., Attorney General's Office,
9 18th Floor, One Ashburton Place, Boston, Massachusetts, 02108,
10 for the Defendant.

P R O C E E D I N G S

THE CLERK: Court calls Civil Action 16-10462, Project Veritas Action Fund v. Daniel Conley, et al. Could counsel please identify themselves.

MR. KLEIN: Your Honor, Stephen Klein on behalf of Project Veritas, joined by Greg Cote, local counsel.

THE COURT: Thank you.

MR. FERCH: Good afternoon, your Honor. Ryan Ferch on behalf of the defendant.

THE CLERK: You can be seated.

THE COURT: Okay. I don't know who wants to go first. We have a motion to dismiss and a motion for preliminary injunction. Sort of logically the standing issue goes first, so I thought we would start there, but --

MR. FERCH: Sure, happy to, your Honor.

THE COURT: -- I'm not so wedded to it. Does that make sense from your point of view?

MR. KLEIN: Your Honor, that's fine.

THE COURT: Okay.

MR. FERCH: Your Honor, as you point out, the crux of our argument is a standing argument, just that the plaintiff hasn't alleged sufficient harm or chilling impact, especially for the drastic relief that they're seeking here. There's no allegations in the complaint that this out-of-state plaintiff had any contacts with Massachusetts before filing this --

1 THE COURT: Well, let me ask you, are you the First
2 Amendment guy? I notice you're also the lawyer on the *Martin*
3 case?

4 MR. FERCH: I am, your Honor. I'm happy to take that
5 distinction, but I'm not sure how much I deserve it.

6 THE COURT: So what we have here are allegations in a
7 complaint --

8 MR. FERCH: Right.

9 THE COURT: -- which I have to accept as true. What
10 more do they need to do? In other words, would an affidavit --
11 sometimes you have jurisdictional standing discovery. I mean,
12 what more do you have to say other than, "I plan to use this
13 news story and I plan to use this technique, and I am afraid"?

14 MR. FERCH: Well, it depends which prong we're talking
15 about. I'll start with the chilling. You have to, and the
16 Supreme Court has said in a couple of cases I'm happy to talk
17 about, you have to articulate two parts of the chilling: one,
18 that you actually have been chilled, and, two, why that is.
19 And so here we don't have anything beyond just a --

20 THE COURT: But suppose they had an affidavit. I
21 mean, I'm sure they could come up with one, right, from the
22 organization? I don't know, I don't think there's one in the
23 record, right?

24 MR. KLEIN: Your Honor, no. However, there is a
25 verified complaint was filed.

1 THE COURT: All right, it's verified. All right, that
2 may suffice. Somebody swears under oath that "I plan to do an
3 article on slum landlords, and I'm afraid to do it because look
4 at the *Glik* case," why isn't that enough? What else could you
5 say?

6 MR. FERCH: Well, I mean, I'll take, for example, the
7 *Susan B. Anthony* case, which was a recent Supreme Court case.
8 That was a case where a plaintiff wanted to put up a billboard.
9 They articulated in their complaint, "This is what we want to
10 say. This is the billboard." They had gone to the committee
11 to have the billboard. They had been rejected. The committee
12 had decided there was probable cause that they would violate a
13 statute, and the Supreme Court said that's enough. You have an
14 articulation of exactly what we're going to say. It was
15 undisputed that the statute covered them.

16 THE COURT: But in this context, I mean, their
17 business model or journalistic model -- that would be a better
18 way -- their journalistic model is to secretly record you, and
19 so they can't do that in advance, like the *Susan B. Anthony*
20 billboard, they can't do that because --

21 MR. FERCH: Well, there's two points --

22 THE COURT: -- they'd be violating the law. They
23 would be under the Commonwealth's case law, so they can't do
24 it.

25 MR. FERCH: Well, there's two points I'd like to make

1 on that. The first one is that journalism doesn't give you a
2 right to do journalism in any way and in any manner that they
3 so choose. They still have to comply --

4 THE COURT: Absolutely. But what you'd want them to
5 do, probably, is go in, interview a slum landlord, and then
6 say, "Oops, I would have done that"? Is that what you want, "I
7 would have done that with a tape recording but I didn't because
8 of the law"?

9 MR. FERCH: Something like that I think would get a
10 lot closer. I mean, there needs to be something more. Right
11 now we have -- and keep in mind that we still have the *Iqbal*
12 standard for pleadings. You have to have something more than a
13 legal conclusion to --

14 THE COURT: Have you seen these people? I mean, they
15 do this. I mean, this is not just some -- they're pretty
16 prominent in doing this. I mean, I don't disbelieve that they
17 do it, do you?

18 MR. FERCH: No, but again --

19 THE COURT: Did you look at their website?

20 MR. FERCH: Yeah. I mean, your Honor --

21 THE COURT: I mean, they do it. That's what they do.
22 So, I mean --

23 MR. FERCH: But again, your Honor, we're talking about
24 an unarticulated story that may never come to pass. There has
25 to be -- I mean, going back to the premise I started with,

1 there's no alleged contacts with Massachusetts at all. They
2 admit in their opposition they haven't even sent somebody here,
3 and yet they're asking on the flip side this Court to strike
4 down the entire state statute, having never been to
5 Massachusetts, and articulating absolutely no steps that have
6 been taken on the statute other than a business model. And
7 what we're saying is, that's simply not sufficient for --

8 THE COURT: So if they had an affidavit with a game
9 plan for how they were planning on doing this investigative
10 reporting --

11 MR. FERCH: We'd have to see that. I mean, I think --

12 THE COURT: I don't buy the argument that you actually
13 have to go in and violate the law before you have First
14 Amendment standing.

15 MR. FERCH: No, and I think the case law is clear, and
16 I'm not arguing that you have to violate the law, but what you
17 have to do is articulate steps that you're covered by the law
18 and that you actually either -- and, again, the First Amendment
19 context -- either that you're going to face a certainly
20 impending prosecution or that you are actually chilled from
21 doing it, and they haven't done either of one of those here.
22 There's --

23 THE COURT: So let's suppose he gives me an affidavit
24 from -- I don't know who's the lead guy now, lead or woman.
25 They come in. They give me an affidavit. They say, "We have

1 this game plan. Here are the details for what we plan to do.
2 True, we don't have any reporters currently in the state, but
3 it's a small country. They'll fly in and they'll --" I don't
4 know what you do -- "they'll go interview slum landlords."

5 MR. FERCH: I mean, certainly they would have the
6 ability to attempt to amend the complaint or to bring an
7 affidavit in. They could do that. We could look at it at that
8 point. I don't want to concede what's enough but --

9 THE COURT: They sort of alleged that in the
10 complaint, in the verified complaint, I mean, close to that
11 anyway, so I don't know that I'd want to --

12 MR. FERCH: I'm not sure how close to that they get.

13 THE COURT: All right, well, you tell me. What is it
14 you can tell me about the standing issue? And if I think this
15 isn't enough, would you want to supplement it?

16 MR. KLEIN: Your Honor, I don't believe -- I believe
17 Project Veritas Action Fund has adequately shown standing.
18 Again, we have the relaxed standards of the First Amendment
19 challenges. Moreover, we still have *City of Chicago v.*
20 *Morales*. Veritas Action comes into this court not just
21 representing itself, but this is one of the few areas where it
22 has third-party standing. It is representing anyone within the
23 Commonwealth who seeks to record secretly. As far as -- I
24 agree with your assessment. I don't understand how an
25 affidavit would change the chill here. This is already

1 established by Veritas. We're talking about a misdemeanor
2 statute that prohibits even possession of secret recording
3 devices, and you're a member of this organization, whether an
4 independent contractor, whether an employee. Evincing that
5 intent to use that to secretly record it seems --

6 THE COURT: I suppose I could require more
7 particulars, and even if you did it ex parte because you didn't
8 want to tip off the slum landlords, you know, what is your
9 plan? Who in particular were you planning on interviewing?
10 What's the practice that you were most -- I mean, you could get
11 more details. Is that available?

12 MR. KLEIN: Your Honor, I think PVA certainly could,
13 but the question is, then this continues to go in kind of a
14 fundamental misunderstanding of the news-gathering process, is
15 that PVA, a lot of what it gets it stumbles upon. I mean,
16 we're coming into this case serendipitously after a few weeks
17 of PVA's most powerful reports yet, as in 10 million hits on
18 YouTube between two videos. That all began with a happenstance
19 meeting in a bar in Wisconsin with a guy rambling to his
20 heart's content to the point where everybody around could hear
21 him, and the PVA reporter was wearing a hidden recording
22 device. So this idea that PVA can lay out this game plan
23 strikes me as just asking far too much, and then --

24 THE COURT: But it does require that since you haven't
25 done anything in Massachusetts, understandably because it would

1 be illegal here, still that you're not just making up out of
2 whole cloth, "Oh, I could, let's see, I could try and figure
3 out slum landlord problems." I mean, I think that's what
4 they're saying, you made something up to essentially get the
5 hook to come in here. So something a little more concrete than
6 that, I suppose that's what they're arguing you need.

7 MR. KLEIN: Well, your Honor, I would disagree. Given
8 the breadth of this statute, I just believe, particularly on
9 the compliance side with my clients, I have concerns about a
10 felony statute. I have concerns about conspiracy. I have
11 concerns about other inchoate defenses to come into
12 Massachusetts. And particularly in the defendant's final reply
13 brief, there's a certain attitude of, "Go be real, journalists,
14 and then prove to us that doesn't work, and then maybe you'll
15 have standing to challenge this." And I --

16 THE COURT: Well, as you stand here as an attorney,
17 officer of the court, is there genuinely a game plan to come in
18 here and do an investigation of housing?

19 MR. KLEIN: Your Honor, if this unequivocal ban was
20 not in place, yes.

21 THE COURT: So if I were to -- I haven't had a First
22 Amendment standing case in a while. The verification may make
23 this unnecessary, but if I wanted more details, more details
24 exist?

25 MR. KLEIN: Yes, your Honor.

1 THE COURT: All right, so let's move on now to the
2 motion for a preliminary injunction. So while you're on your
3 feet --

4 MR. KLEIN: Thank you, your Honor, and may it please
5 the Court, my name is Stephen Klein again.

6 THE COURT: Where are you from, which firm?

7 MR. KLEIN: I'm a solo practitioner in Virginia, your
8 Honor.

9 THE COURT: Virginia?

10 MR. KLEIN: Yes.

11 THE COURT: Welcome --

12 MR. KLEIN: Thank you.

13 THE COURT: -- to our glorious fall weather.

14 MR. KLEIN: This case is about the broadest censorship
15 of undercover news gathering and public accountability. As I
16 mentioned during the standing discussion, Project Veritas is
17 coming off of some of its most successful reporting to date:
18 as far as distribution, 10 million hits on YouTube and
19 featuring some very, indeed, revealing comments; a political
20 operative well placed in a consulting firm that consults with a
21 Presidential campaign stating, "It doesn't matter what the
22 friggin' legal and ethics people say. We need to win this
23 mother --" fill in the blank. Suffice it to say, he was
24 speaking of the 2016 election.

25 Regarding certain protests and agitation that's been

1 going on throughout this Presidential campaign cycle, we have
2 another quote given in a crowded bar: "We have mentally ill
3 people that we pay to do things --" the word was not
4 "things" -- "make no mistake."

5 We have yelling in an open room with others around,
6 not party to the conversation, someone taking credit for
7 organizing a protest in Chicago that shut down a rally for a
8 Presidential candidate.

9 The First Amendment concerns here are that in the
10 Commonwealth, as laid out by the defense, the requirement that
11 someone in PVA were to tell any of those people who were
12 recorded in any of those comments that, "By the way, I'm
13 recording this," or to openly display recording equipment, is
14 not merely to say that those comments would not have been made
15 it onto the record, it is the fact those comments never would
16 have been stated. I think that those claims, had they been
17 written down, had they been recorded in any other form, would
18 simply have been plausibly deniable and in fact incredible.
19 There is a power to video, and audio in particular. There is a
20 power to having truth; hence, the name Project Veritas.

21 Likelihood of success, the First Amendment interests
22 here -- and I think, to put this into perspective, your Honor,
23 the conflict here is that we've had the Commonwealth, the
24 interception statute has been on the books for a very long
25 time, and yet many, many, so many cases have happened. And I

1 think to put it into the most perspective is, we have *Jean v.*
2 *Massachusetts State Police* from 2007, which adopted the Supreme
3 Court's *Bartnicki* precedent and ruled that if Project Veritas
4 were to do any kind of secret interception here in the
5 Commonwealth, it would be liable for a felony; but if it were
6 to take that document or that file and send it to the New York
7 Times, therein would be a wall of separation: five-year felony
8 for Veritas, free speech for the New York Times.

9 THE COURT: Well, while you're on *Jean*, a First
10 Circuit case, that seems to suggest that it's an intermediate
11 level of scrutiny. So while you may want to preserve that for
12 a higher being, isn't that the standard I need to apply?

13 MR. KLEIN: Your Honor, I stand by strict scrutiny for
14 a few reasons.

15 THE COURT: But does *Jean* say intermediate?

16 MR. KLEIN: *Jean* does.

17 THE COURT: Okay. And since the First Circuit, I
18 don't even go up like this; I just go down the hall like that.
19 That's where I am, okay? And I do understand you want to
20 preserve it. I can't change that, right?

21 MR. KLEIN: Your Honor, I think --

22 THE COURT: As much as I think I'm all powerful as a
23 DJ, I can't change the standard of the First Circuit. Right,
24 that's the standard?

25 MR. KLEIN: Your Honor, I believe in particular, to

1 consider a distinguishing factor, is the fact that the
2 government in this statute has preserved for itself the ability
3 to, under very narrow circumstances, but nevertheless under
4 certain circumstances, to go and get itself a warrant, and
5 thereby get itself single-party recording. It's giving
6 government a power that it is denying the citizens. And I
7 think for that, on that basis, there are content issues. You
8 know, we could certainly bring an equal protection as well, but
9 I urge you to certainly not ignore that fact; that for a
10 statute that preserves privacy, it's doing it in such an
11 un-uniform way, that that may indeed trigger a strict scrutiny.

12 Having said that, even under intermediate scrutiny,
13 your Honor, particularly in light of the *McCullen v. Coakley*
14 decision, we now have Supreme Court precedent stating that,
15 well, we don't have to use the least restrictive means in
16 intermediate scrutiny, but we do have to consider means that
17 are less intrusive upon First Amendment conduct.

18 THE COURT: Right, "a close fit" is often the way it's
19 described, right?

20 MR. KLEIN: Yes, your Honor. And in that sense, we
21 have many other states to compare to, whether under strict or
22 intermediate. If the Commonwealth wants to protect private
23 conversations from intentional secret recording, then the
24 Commonwealth needs to protect private conversations from the
25 intentional secretive recording. It should not be protecting

1 any conversation anywhere at any time from secret recording. I
2 believe that the reasonable expectation of privacy standard,
3 which is used a lot in the Fourth Amendment context that has
4 been adopted in many other states, really shows the value of
5 this. In most states that have even two-party consent, we have
6 an exception; that if somebody is speaking either in a
7 situation where they have no reasonable expectation of privacy
8 and are not exhibiting that expectation, then we understand
9 that that is free to record.

10 THE COURT: One legal question that I had in reading
11 the cases was, in a close-fit kind of analysis, let's suppose
12 the statute -- and I'm going to ask you the same thing -- the
13 statute was not a close fit but that a judicial decision
14 narrowed it, by which of course I mean the First Circuit
15 opinion in *Glik*, so you had essentially a legal narrowing by a
16 court that took away what I would call the most compelling
17 cases you have for news gathering.

18 MR. KLEIN: I'm not quite sure I understand, your
19 Honor. In *Glik* it was a -- and I loop that back into the
20 standing argument to point out, in *Glik* we -- you know, as far
21 as the chill on Veritas is, people get arrested in Boston for
22 not violating this statute, as *Glik* showed, so there's
23 certainly concern about getting arrested for actually
24 violating --

25 THE COURT: But suppose you just had a bright line:

1 If you're a public official acting in a public place, this
2 doesn't apply; this only applies in private settings.

3 MR. KLEIN: That is one of the assertions we made in
4 our complaint, your Honor, and it's --

5 THE COURT: So would that satisfy, I mean, since
6 essentially that is one way of thinking about what the *Glik*
7 court was signaling?

8 MR. KLEIN: It certainly helps Veritas for a lot of
9 its reporting, your Honor, but it doesn't quite go far enough.
10 There are nonpublic officials who engage in a lot of public
11 conduct. In fact --

12 THE COURT: But for the private people, the balancing
13 starts tipping against you. In other words, as I understand
14 it, you're taking the position you can record anywhere, even
15 with a private person, so long as there's one-person consent.
16 You're going to the other extreme.

17 MR. KLEIN: Your Honor, we are not arguing -- as a
18 matter of public policy, we certainly support single-party
19 consent. It certainly makes my job a lot easier on the
20 compliance side. But for a constitutional standard, again, to
21 suggest we could incorporate it either through a reading of the
22 statute or even as a constitutional free speech standard is not
23 our assertion. Again, this is an overbreadth or under
24 traditional tailoring. The problem here is that in protecting
25 privacy, this statute just simply goes too far. It simply

1 takes and allows citizens in any situation to walk around in
2 public with this bubble of protection that there is no
3 reasonable expectation of, and no reasonable objective person
4 would think they have privacy.

5 THE COURT: I'm curious, did local counsel tell you
6 about the *Demoulas* case?

7 MR. KLEIN: Your Honor, no.

8 THE COURT: You're familiar with it, right?

9 MR. COTE: It has been quite some time, your Honor,
10 but --

11 THE COURT: Well, the *Demoulas* case is a local
12 scandal. Are you familiar with it?

13 MR. FERCH: Only --

14 THE COURT: You're all too young, okay? You're all
15 too young.

16 MR. COTE: I remember the facts. I don't remember the
17 particulars.

18 THE COURT: All right. So I had a piece of it, and
19 other judges had pieces of it. It was litigated over a long
20 period of time. The gist of it was and the relevant part of it
21 was is that the family was trying to undermine the credibility
22 of a judge and did so by having a false interview with the law
23 clerk, in which case they tape-recorded the law clerk talking
24 about the judge, and he thought it was a private interview, and
25 of course they used it to motion to recuse. The piece I had

1 was, a prostitute tried to seduce somebody who was friendly
2 with the family to get information out of him in bed, and she
3 was tape-recorded.

4 Okay, now, so this was a big case here, so it's just
5 prominent in my mind. I mean, at some point your position is
6 that both of those would have been okay. Neither of them were
7 public people. You know, it creates no protection or privacy
8 for people, right?

9 MR. KLEIN: Your Honor, because we brought a facial
10 challenge, we stand by the *Hyde* ruling that calls this an
11 unequivocal ban. I am certainly hesitant to encourage judicial
12 rewriting, particularly of a state statute, but that is not our
13 argument. I mean, a facial invalidity would certainly send
14 this back to the Massachusetts General Court for some
15 rewriting, but there are ample options that would defend --

16 THE COURT: Well, why wouldn't just as good an option
17 simply say "public people, public places," and then the rest of
18 it, the privacy outweighs the First Amendment? Because that's
19 essentially what the First Circuit was doing.

20 MR. KLEIN: I think it would head more in the right
21 direction as long as public places include places with no
22 reasonable expectation of privacy. That's usually interpreted
23 as: Someone else is around there who would have overheard the
24 conversation anyway. That's at least how I've interpreted it
25 in practice in states like California and others. So I really

1 think this two-prong analysis -- and there's many, many cases,
2 your Honor, and I'm certainly happy to provide supplemental
3 briefing on these litany of cases that show how this is played
4 out in practice. And, you know, you have Florida. You have a
5 case of a man in an apartment screaming into his telephone.
6 He's in a place, a place with a reasonable expectation of
7 privacy, but he's not objectively showing that expectation, and
8 thus his neighbor was able to record him through the wall just
9 by virtue of holding up a tape recorder.

10 THE COURT: And that would be okay?

11 MR. KLEIN: Yes, that is okay in Florida, and I think
12 it would be and should be okay because, again, the person is
13 not doing anything on their own part to secure that privacy
14 interest.

15 We have cases in California, a case in California
16 where someone was on a public street in public, but he was
17 speaking very quietly to somebody next to him. He was really
18 exhibiting that "I'm trying to keep this quiet," and the only
19 reason he was picked up is because someone snuck up behind him
20 with a recording device and was able to --

21 THE COURT: We could all come up with a parade of
22 examples that would make us squirm, but your view is,
23 essentially all private people in private places as long as one
24 person has consented to having it recorded?

25 MR. KLEIN: From a matter of public policy, your

1 Honor, absolutely. From a matter of constitutional law and
2 what we argue in this case, no.

3 THE COURT: So let me go to you because, I mean, the
4 law -- and I want to make sure you're familiar with the *Martin*
5 case. Are you?

6 MR. KLEIN: I don't believe so, your Honor.

7 THE COURT: There's a companion case. "Companion" is
8 broadly put.

9 MR. KLEIN: Oh, excuse me. Yes, your Honor.

10 THE COURT: I think -- is it *Martin*?

11 MR. FERCH: Yes, it is. ACLU, they're representing
12 *Martin*, you're correct.

13 THE COURT: So I just read the brief you filed in that
14 case -- and I noticed you're the First Amendment guy -- in
15 which you urge me to certify the question to the SJC. Just
16 filed it three weeks ago or something like that?

17 MR. FERCH: Right, and I'm hesitant to argue that,
18 since --

19 THE COURT: No, but why wouldn't -- in other words,
20 don't I have to decide these cases in tandem? They're looking
21 for a carveout for public people, as I understand it, like
22 police officers.

23 MR. FERCH: I don't -- there's sufficient distinction
24 between the cases that -- you're right, they raise a lot of the
25 same issues.

1 THE COURT: I'd have to write these opinions together.

2 MR. FERCH: In some ways, yes. Before I go on to
3 that, I want to go back because it applies to both. On the
4 standing issue, the First Amendment standard has been changed
5 in recent years with the *Clapper* and *Blum* case, *Blum* coming out
6 of the First Circuit in 2014. So that case, you have noted
7 earlier that it might have been a few years, so I wanted to
8 highlight those cases because they apply to both.

9 The distinctions between the two, this case, again,
10 we're dealing with out-of-state plaintiffs seeking facial
11 invalidity of the entire statute. *Martin* we're dealing with
12 two named plaintiffs in I believe Dorchester or Roxbury that
13 are making a specific allegation trying to extend the *Glik* case
14 in a narrow confine. And it's important to understand that
15 *Glik* and the other First Circuit cases haven't addressed the
16 secretive nature. So *Glik* was an open recording case, and the
17 First Circuit was clear in *Glik* to say that their rule or the
18 clearly established law for 1983 purposes was that you could
19 record public officials in public performing their duties; but
20 they made clear to say that it's not an unfettered or unlimited
21 ruling, and they specifically didn't address the secretive
22 nature of that.

23 THE COURT: Right, because all they were addressing
24 was qualified immunity and as to what was clearly established,
25 but you don't have to read much if you read that and then you

1 read Justice Cordy's and Marshall's, both of whom are not on
2 the bench anymore, dissent in -- was it *Healy*?

3 MR. FERCH: I believe it was *Hyde*.

4 THE COURT: *Hyde*, I'm sorry, I got the name wrong.
5 You know, the way the law is moving on public people.

6 MR. FERCH: Right, and we have an argument obviously
7 in the *Martin* case, and I don't want to argue it, that that
8 argument there is that it's better suited, given the evolving
9 technology, to certify that question back to the SJC so that
10 they can determine that narrow issue under state law, given the
11 evolving nature, and given -- I mean, it's just plain that
12 technology has changed so much. *Hyde* was a 2001 case, and they
13 were talking about tape recorders then, I think.

14 THE COURT: Well, and the way you were arguing it,
15 Project Veritas could just go in with phones that weren't part
16 of a common carrier and it wouldn't be covered. Not that I'm
17 giving you ideas, but, I mean, that was the position that you
18 took, kind of thing.

19 MR. FERCH: I tried to be very careful in that brief
20 to say that that's one potential argument that could be made,
21 and I do think that that's an argument that the state courts
22 and the state Supreme Judicial Court should be making or the
23 legislature should be making, not a plaintiff bringing an
24 out-of-state complaint.

25 THE COURT: Well, you keep saying that, but the

1 New York Times is out of state. They come in here all the
2 time. I mean, with the Boston Marathon, you know, I had 500
3 media organizations here, 500. So people come in from out of
4 state. They're still journalists.

5 MR. FERCH: They do, and, as you say, they come in all
6 the time, but, again, going back to the pleading, there's no
7 allegation that they've ever been here except for this
8 complaint. That's the point that I'm making, that really
9 they're trying to strike down an entire state statute for a
10 state that they apparently have no contacts with --

11 THE COURT: Right, but let's -- I get it.

12 MR. FERCH: Right.

13 THE COURT: I'll think about that one.

14 MR. FERCH: I don't want to --

15 THE COURT: But on the merits, on the merits, can I
16 consider, on an intermediate scrutiny, limiting principles by
17 the First Circuit, and the other courts, and basically narrow
18 it on my own, subject to the case law that is applicable?

19 MR. FERCH: And I think I want to be careful here.

20 THE COURT: I'm not sure of the doctrine, whether I
21 can do that.

22 MR. FERCH: And this is where I want to be careful on.
23 The question under intermediate scrutiny, I don't think --
24 there's two parts. The legitimate government interest, I don't
25 think there's any dispute on that; the privacy is a legitimate

1 government interest.

2 THE COURT: Right.

3 MR. FERCH: The second is the incidental impact that
4 is no greater than necessary, and I think, in determining that,
5 what you're looking at is the scope of the statute, its
6 relative impact on, arguably, First Amendment protected
7 communications versus its impact on non-First Amendment; and I
8 think, in considering that, you can look at how other cases
9 have construed this statute to determine exactly what the scope
10 of the statute is currently.

11 THE COURT: In deciding whether it narrowly fits, I
12 can take into account existing case law?

13 MR. FERCH: I certainly think you can because I think
14 that case law construes the statute and would be relevant to
15 how it is applied today.

16 THE COURT: Now, could I do it myself? Let's assume
17 that it's correct that *Glik* is not on all fours because it was
18 a qualified immunity as to what was clearly established. On my
19 own, if I did it, especially with the companion case of *Martin*,
20 in your view, doctrinally, can I narrow myself?

21 MR. FERCH: I'm hesitant --

22 THE COURT: Or is it all or nothing? I think Project
23 Veritas would say all or nothing, that I just can't do that.

24 MR. FERCH: I'm hesitant to say "yes," but I think,
25 and we argue that in this case, that there is a doctrine, and

1 it's in my brief, and I can't remember, but there is a
2 constitutional avoidance or -- I'm messing up the words -- but
3 it's the doctrine that you read a statute to be as
4 constitutional as possible, read it in a way such that it will
5 make it constitutional. And if you're going to do that, I
6 think the argument is, as opposed to striking down the entire
7 statute completely, it can be read, perhaps with a limiting
8 instruction, that would have made it constitutional.

9 But that gets to the point that -- and the other
10 distinction with *Martin* is, it's an as-applied challenge as
11 opposed to a facial challenge. So in as-applied challenges,
12 and that's -- going back to *Jean*, that's similar; it's not on
13 all fours, but that's effectively what the First Circuit and
14 the Supreme Court were doing. In *Jean* the First Circuit
15 conceded that the person that made the recording could have
16 been prosecuted but that the person who published the recording
17 could not.

18 THE COURT: Could not.

19 MR. FERCH: Even though the First Circuit recognized,
20 arguably, the way the statute is written that person could be
21 prosecuted under the statute, there was a limiting construction
22 there.

23 THE COURT: So when I read -- you know, it's funny, I
24 read *Citizens United* back in the day, but I sort of had never
25 read it with this in mind. I mean, essentially the Supreme

1 Court, they started off with in an earlier case trying to
2 construe it as applied to make it constitutional, and then,
3 finally, in *Citizens United* they sort of gave up, and they
4 said, "Look, we can't be the legislative body here. Thumbs
5 down. Rewrite it, Congress."

6 I mean, I'm trying to think whether I -- let's assume
7 I think it's narrowly tailored with respect to private people.
8 I can't come up with every hypothetical. I challenge myself
9 sometimes: "Well, what if this? What if that?" But let's
10 assume, just broad brush, the privacy concerns of private
11 people, but what about public like the, you know, policemen?

12 MR. FERCH: I think on that point, I think we're a
13 long ways away from *Citizens United* or even the recent *Johnson*
14 opinion where the Court basically is throwing its hands up and
15 saying you can't do it. I --

16 THE COURT: *Johnson*, the criminal case?

17 MR. FERCH: The criminal case, right.

18 THE COURT: Oh, I do know that one.

19 MR. FERCH: Yeah, I figured you did. I think we're a
20 long ways from that, and I think the reason for that is -- and
21 this overlaps a little bit with the standing -- there simply
22 aren't that many prosecutions under this under state law. It
23 just does not come up that frequently.

24 THE COURT: Let me tell you, that *Demoulas* case was
25 not a prosecution. It was a civil suit for damages. So, I

1 mean, it comes up. That counts, doesn't it?

2 MR. FERCH: It comes up in that context, but there's a
3 separate provision that's not at issue here which allows for
4 torts of the individual person. I mean, again, it's important
5 to remember that only one defendant has been named here, and
6 that's the Suffolk DA. And the argument has to be that the
7 Suffolk DA as the defendant is the one that will actually
8 prosecute this case, and they've only really been able to and
9 I'm only really aware of two alleged prosecutions, one which
10 was *Glik*, which was dropped in the District Court, and then the
11 other one is the *Manzelli* case, which I believe was over ten
12 years ago, and so those are really the only two times that this
13 has been prosecuted.

14 THE COURT: I don't know, wouldn't you be worried? I
15 mean --

16 MR. FERCH: Again, I think that gets into the
17 question -- I don't want to argue the *Martin* case -- it gets
18 into the question of modern technology and in what context
19 we're talking. And I think it's important to remember here
20 that there is no constitutional right to secretly record. And
21 I think it's also important, I think one-party consent --

22 THE COURT: I get that, and I first thought that, but
23 it does say and the Supreme Court has said that news-gathering
24 is protected by the First Amendment, and you can't -- I took
25 down the word that he used -- yes, that audio taping has a

1 different power, I think was the word used, rather than just
2 taking notes or trying to remember and then going back and
3 taking notes, because, I mean, the way they do it is, they
4 essentially don't notify anyone. They're in casual
5 conversations or they're on the street or wherever. So it
6 doesn't carry the punch to just say, "Well, I was in this
7 conversation with someone and this is what he said," and he
8 said, "No, I didn't." So the news-gathering is protected.

9 MR. FERCH: The news-gathering, but it's not an
10 absolute privilege, and the Supreme Court has said that as
11 well. You can't news-gather in any way and in any manner, and
12 that's the point that I --

13 THE COURT: Well, that's their point too: "Yeah, and
14 we're not going to violate the law, so we need this declared
15 unconstitutional." I mean, that's their big point: "We're not
16 permitted to do it this way."

17 MR. FERCH: But the other point is that states also
18 have the right within their sovereign powers to make decisions
19 for their constituents. The Massachusetts legislature made the
20 decision that two individuals having a conversation, one should
21 not have to fear that they're going to be secretly recorded by
22 that second person.

23 Now, I want to make clear that one-party consent is
24 really a misnomer. What one-party consent means is that I can
25 choose to consent and secretly record somebody else. So that's

1 what the legislature here has said --

2 THE COURT: Sure.

3 MR. FERCH: -- that you're not allowed --

4 THE COURT: It's basically, I hate to say it, federal
5 law. I mean, I deal with that day in and day out in the drug-
6 trafficking context. You know, you get one trafficker. He's
7 wired. He goes in with another drug trafficker. You don't
8 need a warrant. I mean, the federal law is exactly what
9 they're asking for.

10 Now, I do take it that the state legislatures have the
11 power to protect privacy, and so then the question is, is this
12 narrowly tailored to do that? Really, that's the issue.

13 MR. FERCH: And our argument is "yes" because, as we
14 point out in the brief and as you pointed out here, there's a
15 large host of areas, any conversation between two individuals,
16 and we point out some of the examples in our brief that aren't
17 protected by First Amendment. And, as you pointed out, the few
18 instances of news-gathering of public information, again, with
19 the *Martin* case, it's a little bit unclear, given current
20 technology, but you're certainly allowed to openly record that.
21 And it is narrowly tailored in that sense because it isn't --
22 the incidental -- again, intermediate scrutiny allows for some
23 infringement on First Amendment rights. It's not an absolute
24 bar. It's just a question of, how do you compare that
25 infringement versus the scope of the statute? And our argument

1 here is, any infringement is minor compared to the scope of the
2 statute for unprotected --

3 THE COURT: Well, what if I carved off public
4 officials acting in the scope of their public responsibilities
5 or in a public arena? You know, like someone giving a speech
6 is what I'd be thinking of. Am I allowed to do that? In other
7 words, if I think that that's constitutionally impermissible,
8 that the public interest outweighs the privacy interest at that
9 point, is that something I'm allowed to do is rewrite it
10 constitutionally?

11 MR. FERCH: I don't think so because I don't think
12 there's any -- again, we'd be having to talk about the -- we're
13 talking about the secretive nature. The First Circuit has
14 already carved out that without the secretive part, so what you
15 would be including is the secretive nature, and you'd have
16 to -- and it's not raised in this case. Again, we argue it
17 shouldn't be raised in the *Martin* case because it should go
18 back to the state to determine that issue, but effectively what
19 you'd be having to do is say that the secretive nature is
20 allowed in that context. And I point back to the *Hyde* case in
21 the SJC. They made the point, the majority in that case I
22 thought made the point very well that how do you define public
23 employee? Is it teachers? Is it parent/teacher conferences?
24 Is it the meter takers? Is it a parking attendant? Is it
25 you --

1 THE COURT: Yes, it's difficult. I read that, both
2 the majority and the dissent, with great interest because it
3 does point out the difficulties.

4 MR. FERCH: And, again, I think that especially raises
5 the point that this is important for the state legislature.

6 THE COURT: On the other hand, that example of that
7 young woman whose husband was shot who had the cell phone
8 recording --

9 MR. FERCH: Oh, the one in Chicago, I believe?

10 THE COURT: I don't remember where it was, but, in any
11 event, it was sort of one of those sad situations the nation
12 was riveted by. You know, she was tape recording the whole
13 thing, so she could have been prosecuted.

14 MR. FERCH: No, not in Massachusetts. My
15 understanding is, she was tape recording in the open and the
16 cell phone was openly --

17 THE COURT: Is that right? But what if she weren't?
18 You would say she could be prosecuted. What if it was in her
19 pocketbook or something and she turned it on?

20 MR. FERCH: And, again, that's the *Martin* case where
21 we say that really the SJC should be determining that. But if
22 it's in her pocket, if it's intentional, there's a lot of
23 hurdles that you would have to get over to get to that, but --

24 THE COURT: Because at some point, if it's too hard
25 for me, if I think that the public interest, say, in that

1 situation outweighed the privacy interest of the police
2 officer, there are interests here, but you say, "Oh, you can't
3 do that. What about the schoolteachers, and what about the tax
4 assessors?" I can't remember. They came out with a parade of
5 horrors which I couldn't answer.

6 MR. FERCH: Right.

7 THE COURT: But then in a way that feeds right into
8 Project Veritas' point, which is, "This is too hard. Throw it
9 out and let a legislature look at what other states have done."
10 I mean, essentially that's their point: "You don't do it,
11 Judge," and that's what I'm sort of struggling with in my own
12 mind.

13 MR. FERCH: Well, I mean, again, the easiest way we
14 say is to throw it out on standing so you don't have to do
15 that, but --

16 THE COURT: I got it. It's tempting, but I do worry,
17 in the First Amendment context, it's just, he's correct, a more
18 relaxed standard.

19 MR. FERCH: It is, but that's where I point to the
20 *Blum* case because it's not as relaxed as it used to be, or as
21 this court -- or, sorry, I keep saying "this court" -- the
22 First Circuit --

23 THE COURT: The standard is not blooming, huh?

24 MR. FERCH: Yeah, it is more difficult. The standard
25 under *Clapper* from the U.S. Supreme Court is "certainly

1 impending," not reasonable, so it is a much higher standard
2 than it used to be in the First Amendment context.

3 We understand the concerns. There certainly are
4 competing interests here and it's difficult, but the question
5 again is secret recording. That's really what we're talking
6 about, and is that -- there's no First Amendment right, no
7 court has recognized a First Amendment right to secretly
8 record; and in fact it could be a reasonable time, place, or
9 manner restriction. As the First Circuit said in *Glik*, it said
10 in the *Gericke* case -- I could be mispronouncing it -- the
11 First Circuit has punted on that issue.

12 THE COURT: Which one? In what case?

13 MR. FERCH: I believe it was *Gericke*. It was the
14 New Hampshire case that came after *Glik*. It was a traffic stop
15 with the New Hampshire statute in which the -- again, it was an
16 open recording case where the woman told the police officer,
17 "I'm planning to record this." The First Circuit extended the
18 *Glik* holding to traffic stops saying that the police officers
19 were performing their duties in public when it's a traffic stop
20 at night just between the police officer and the person in the
21 car, but they dropped a footnote saying, because this is open,
22 we don't have to address whether or not this is a reasonable
23 time, place, or manner restriction. So there certainly is
24 areas in the law in which secret recording or a ban on secret
25 recording arguably is allowable. You don't have to strike out

1 the secret recording entirely.

2 THE COURT: So it's clear that the First Amendment
3 protects the right to gather and disseminate news, but you
4 would say, but there's no right to do it through audio
5 recordings?

6 MR. FERCH: Let me --

7 THE COURT: Secretly do it.

8 MR. FERCH: There's no right to do it with intentional
9 secret recordings.

10 THE COURT: Thank you. And have I set a hearing
11 yet -- I should ask Maryellen -- on the other case, the *Martin*
12 case? So we need to set that. Is the op coming in?

13 MR. FERCH: My understanding on that case, and I don't
14 remember the date, the other side has asked for an extension to
15 file an opposition to both us and the police department. I
16 suspect we may file for leave to file a reply brief in that
17 case, depending on what comes in. I'm guessing probably
18 January or February would be --

19 THE COURT: February.

20 MR. FERCH: Well, I don't know. I don't know what the
21 timing on it is.

22 THE COURT: I just can't imagine writing these two
23 separately without thinking about them.

24 Have you been coordinating with the lawyers there,
25 Mr. Klein?

1 MR. KLEIN: No, your Honor. I've been in touch with
2 Jesse Rothman, I believe is their counsel. We've spoken via
3 email, but we have not coordinated these cases in any way.

4 THE COURT: Well, I'm not saying that would be a bad
5 thing or a good thing. Just timingwise, I just can't imagine
6 not having one in mind with the other, particularly on the
7 common issues.

8 So did you want to respond at all before I let you go
9 home on this beautiful weekend.

10 MR. KLEIN: Thank you very much, your Honor. The *Blum*
11 case which has been cited a few times -- and I hesitate, I
12 don't have it in front of me -- but this is not a case, and I
13 think *Blum* was pretty clear that the law in question was not
14 actually going to apply to the people challenging it; and that
15 was a, you know, you can't have a subjective chill when that's
16 the case. Here we have an unequivocal ban on PVA's activities.
17 And I think, again, the few cases, as much as there are not
18 that many of them, they show that having a five-year felony in
19 effect for intentional secret recording has done a pretty good
20 job at prohibiting this kind of conduct. But we have enough
21 really bad cases already, and I'm not here to relitigate
22 *Commonwealth v. Hyde*, but there's a certain Kafkaesque angle to
23 somebody recording their own conversation with a police officer
24 secretly, taking that tape to the police department to
25 illustrate, you know, "I didn't like how I was treated," and

1 then being charged with a crime, and that's certainly --

2 THE COURT: That is troubling.

3 MR. KLEIN: -- the breadth of that.

4 I want to just mention that the *Gericke* case was
5 brought up, *Gericke*. That was fascinating because in the
6 intermediate scrutiny context, we have that the safety of
7 police officers cannot be so broad as to prohibit all
8 recording, but we can have these reasonable restrictions that
9 as long as that, you know, police officer is not being, you
10 know, threatened by somebody, you can record them at a
11 distance. That same kind of reasoning I think applies here and
12 shows that you can't just have a bubble that you can walk
13 around in public with, and belt out whatever you'd like at the
14 top of your lungs, and if someone secretly records that, it can
15 be a felony in Massachusetts.

16 THE COURT: How about somebody talking in a restaurant
17 booth that you can sort of, you know, a little glass of wine, a
18 little too loud, you're standing there with the recorder on the
19 other side of the booth? I mean, for every parade of horrible
20 you can talk about their position, it flips. So that's what
21 makes this so difficult. And with some sort of humanity about
22 I'm not a lawmaker, I don't know the extent to which I should
23 just carve out things that privacy rights clearly don't
24 outbalance the rights of the public, or whether I just say, "I
25 can't do this, Legislature. Go back to the drawing boards." I

1 have to think about that.

2 MR. KLEIN: And, your Honor, I would only add as far
3 as -- I think that is a proper remedy. This is a facial
4 challenge, and that's what we've put forward, and for that very
5 reason in part. And, you know, I practice campaign finance law
6 primarily, so your mention of *Citizens United*, I have to move
7 and I have to --

8 THE COURT: Were you the lawyer in that case?

9 MR. KLEIN: I was not, no, your Honor, but I --

10 THE COURT: I was going to say.

11 MR. KLEIN: -- must go way back in campaign finance
12 and I must channel a way better lawyer than me, Paul Clement.
13 When he closed the *NFIB v. Sebelius* case, he compared the
14 Affordable Care Act to the Federal Election Campaign Act, and
15 he urged then the Supreme Court to say, this is not a case,
16 when they were talking about severability, this is not
17 something we should pull something out of and hope that the
18 rest of the statute functions.

19 We have some very bad precedent here. We have good
20 precedent in the First Circuit, bad precedent from the
21 Massachusetts Supreme Judicial Court, and I think it's
22 certainly time. The statute's time has come, and given the
23 constitutional implications at play here and given the
24 difficult --

25 THE COURT: The thing that was interesting about both

1 *Citizens United* and *Johnson*, now that you mention it, is
2 actually the Supreme Court tried several times first to narrow,
3 and it was only when they finally just threw up their hands and
4 said "We can't do it" that they said, you know, "facially
5 invalid." *Johnson* I think there must have been three or four
6 cases where they struggled with it.

7 MR. FERCH: I think they cited at least three or four
8 cases in that order.

9 THE COURT: In *Citizens United* they cited one. I
10 didn't spend so much time with it, so I'm not sure if there
11 were more, but, still, very interesting. It's a great case.
12 Thank you for bringing it, very interesting. And I usually,
13 you know, get the big patent case, so it's nice to have a First
14 Amendment issue, and I'll have a second one coming down. I
15 don't think we have a date yet, but I'm unlikely -- while I'm
16 going to get going on this, clearly, important issues that
17 overlap, I'm unlikely to rule till I've got them both side by
18 side to make sure I'm not being inconsistent on what to do.

19 MR. FERCH: And that position, as I said earlier, is
20 fine with us. And I think it's important, when you do get them
21 side by side -- and I can talk again at that hearing, and
22 certainly, Steve, I'm sure you're welcome to come to that
23 one -- about the distinctions between the two and what our
24 remedy is in that case because I think it assuages some of your
25 concerns.

1 THE COURT: Are there any other of these cases
2 floating around in Federal Court somewhere?

3 MR. FERCH: Not in Massachusetts that I'm aware of.

4 THE COURT: No, but I'm just talking about anywhere.

5 MR. KLEIN: No, your Honor, but, again, it speaks of
6 the uniqueness of the Commonwealth's interception statute.

7 THE COURT: Is this the only state that goes this far?

8 MR. KLEIN: I believe so, your Honor. Some other
9 states, Maryland has a possession of recording devices
10 prohibition that is comparable. It's a felony I believe there
11 to possess secret recording devices, so there's the litany, but
12 as far as most states are single-party consent or two-party
13 with the reasonable expectation of privacy exception.

14 THE COURT: I see. So, okay. Well, thank you very
15 much. It was very well briefed. I enjoyed it, and to be
16 continued, *Martin*. Okay, thank you.

17 THE CLERK: All rise.

18 (Adjourned, 3:31 p.m.)
19
20
21
22
23
24
25

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter,
do hereby certify that the foregoing transcript, Pages 1
through 39 inclusive, was recorded by me stenographically at
the time and place aforesaid in Civil Action No. 16-10462-PBS,
Project Veritas Action Fund v. Daniel F. Conley, In his
Official Capacity as Suffolk County District Attorney, and
thereafter by me reduced to typewriting and is a true and
accurate record of the proceedings.

Dated this 7th day of December, 2016.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER